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No. 287

Supreme Court of the United States.

OCTOBER TERM, 1942.

ALDUS C. HIGGINS
v.
COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States.

OCTOBER TERM, 1942.

ALDUS C. HIGGINS

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Aldus C. Higgins prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on June 2, 1942.

Jurisdiction.

The judgment below was entered June 2, 1942. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Is the shifting from the grantor of a trust to the trustees of a limited special power to appoint trust income and principal a taxable gift?

Statement.

The taxpayer in 1920 created two trusts, which were identical, except that one was for the benefit of his son and the son's issue and the other was for the taxpayer's daughter and her issue. Each trust was to continue until the death of the child for whom created and until all of the children of such child reached the age of twenty-one years or died. Upon termination the principal was to be distributed to the children of such child and the then surviving issue of any deceased child or children by right of representation. The taxpayer reserved power to change trustees and to appoint principal to any beneficiary and "to modify the terms of this instrument * * * as to the powers of the trustees * * * with respect to the distribution of income or principal among the beneficiaries herein named or described prior to the termination of the trust."

On March 10, 1938, the taxpayer resigned as trustee of each trust, relinquished all powers reserved to him by the trust instrument and gave to the trustees powers, similar to those which he had relinquished, to change the proportions in which, prior to termination, the beneficiaries might enjoy benefits from the trusts.

The Commissioner held that the taxpayer's action on March 10, 1938, constituted gifts of the whole corpus of

each trust fund. The Board of Tax Appeals sustained the Commissioner and determined a deficiency in gift tax of $283,362.65. The Circuit Court of Appeals for the First Circuit affirmed the Board's decision, relying, in substance, upon the following grounds:

1. That it was bound by the *Sanford* case [1] to correlate the gift tax with the estate tax, "without regard to what happens under the income tax."

2. Once it was decided that the reservation of a power to alter the disposition of the property prevents the imposition of a gift tax at the time the trust is created, even though the donor has irrevocably conveyed the beneficial interest out of himself, it does not matter how wide or narrow the range of potential donees may be, so long as the donor, within that range, retains full power to control the disposition of the property.

3. That "certainty or uncertainty of benefit from the standpoint of the donees is not the test of the incidence of the gift tax."

4. Article 3 of Treasury Regulations 79 (1936 ed.) cannot be given application "prospectively any more than retroactively."

Reasons Relied on for the Allowance of the Writ.

1. The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Prouty,* 115 F. (2d) 331, the decisions of the Circuit Court of Appeals for the Second Circuit in *Helvering* v. *Robinette,* F. (2d) (March 23, 1942), *Helvering* v. *Marshall,* 125 F. (2d) 942, and *Chase National Bank* v. *United States,* 116 F. (2d) 625, the decision of the

[1] *Estate of Sanford* v. *Commissioner,* 308 U.S. 39.

Circuit Court of Appeals for the Seventh Circuit in *Lilly* v. *Smith,* 96 F. (2d) 341, and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* F. (2d) (April 23, 1942).

The Court below cited all but one of the above cases and noted that in those cases the gift tax was imposed, although the estate tax would also be imposed later with respect to the same property, and that in those situations there was no correlation of the gift tax with the estate tax. Yet the Court held that, where the question arising in gift tax litigation was whether there had been a completed gift *inter vivos,* it was bound by *Estate of Sanford* v. *Commissioner,* 308 U.S. 39, to correlate the gift tax with the estate tax, and that since it had held in *Chickering* v. *Commissioner,* 118 F. (2d) 254, certiorari denied, 314 U.S. 636, that the reservation of a similar power subjected property to estate tax, the retention of such a power rendered the gift incomplete for purposes of gift tax until the surrender of the power. The Court's error arises from the fact that there can be no correlation of the gift tax and the estate tax where the estate tax reaches out by description to impose a tax in situations involving no transfer of property at death, but in which death furnishes an appropriate occasion for imposing a tax. The estate tax in such cases does not require a transfer. The gift tax, on the other hand, always requires "a transfer of property by gift." The *Sanford* case does not support the Court below, since in that case, as in *Burnet* v. *Guggenheim,* 288 U.S. 280, the gift tax was imposed upon an actual transfer of substantial economic benefits.

2. Since the trustees, after March 10, 1938, possessed substantially the same powers that the taxpayer had held prior thereto, the holding of the Court below, that "certainty or uncertainty of benefit from the standpoint of the

donee is not the test of the incidence of the gift tax," conflicts with this Court's statement in the *Sanford* case (308 U.S. at p. 46) that "It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he paid the tax."

3. The decision of the Court below is in conflict with the decision of the Court of Claims in *Cockrell* v. *United States*, 39 F. Supp. 148. See Paul, *Federal Estate and Gift Taxation* (1942) 1168. In the *Cockrell* case the Court of Claims held that, where trustees were given such additional powers as the settlor might grant them, the gift was incomplete, whereas the Court below held that, where the trustees had power to distribute income and principal among the beneficiaries in such proportions as they saw fit, there was a completed gift.

4. The decision of the Court below is in conflict with the decision of that Court itself in *Commissioner* v. *Prouty*, 115 F. (2d) 331, in holding that Article 3 of Treasury Regulations 79 (1936 ed.) cannot be given application prospectively, since the Regulation was given prospective application in the *Prouty* case.

5. The decision of the Court below, in giving retroactive application to the 1940 Regulations and in giving no effect to the 1936 Regulations, is in conflict with the decision of this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, since it ignores the fact that the transaction here in question took place when the 1936 Regulations had been in force two years expressly negativing any tax liability, that they stayed in force for two years thereafter, and remained unchanged through five successive Revenue Acts.

6. The questions involved in this case are of continuing interest and are important questions of Federal law which have not been, and should be, settled by this Court. See

Paul, *Federal Estate and Gift Taxation* (1942) Sec. 17.20.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

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BRIEF IN SUPPORT OF FOREGOING PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals is reported in 44 B.T.A. 1123, and is printed on pages 71-81 of the Record. The opinion of the Circuit Court of Appeals is reported in F. (2d) , and is printed on pages 90 *et seq.* of the Record.

Jurisdiction.

Reference is made to the foregoing petition for a statement of the jurisdiction of this Court and the statement of the case.

Argument.

1. The principal question here involved relates to the correlation of the gift tax and the estate tax. The two taxes are not necessarily imposed upon the same thing. The gift tax expressly applies to "the transfer of property * * * by gift."[1] The estate tax not only applies to "the transfer of the net estate" of decedents dying,[2] but also applies where, by reason of certain described transfers, made prior to death, as well as by reason of certain other described circumstances, death "has brought into being or ripened" property rights[3] and the transfers are "too much akin to a testamentary disposition not to be subject to estate tax."[4] Consequently, there can be no correlation

[1] Internal Revenue Code, Sec. 1000 (a).
[2] Internal Revenue Code, Sec. 810.
[3] See *Tyler* v. *United States*, 281 U.S. 497, 503.
[4] See *Helvering* v. *Hallock*, 309 U.S. 106, 112.

of the two taxes except where the estate tax is imposed upon a transfer at death. In all the gift tax decisions on the point, other than the one below in this case, it has been so held.

The absence of correlation in the case of gifts in contemplation of death was referred to by this Court in the *Sanford* case. The Court below has set forth three other instances where there is no correlation. The first appears in *Commissioner* v. *Prouty,* 115 F. (2d) 331, wherein a transfer in trust, with a reservation of power in the donor-settlor, in conjunction with a person having a substantial adverse interest, was held a taxable gift, although this Court had held in *Helvering* v. *City Bank Farmers Trust Co.,* 296 U.S. 85, that the property transferred was, in such a case, still includible in the donor's gross estate for estate tax purposes. The second instance is found in *Helvering* v. *Robinette,* F. (2d) (March 23, 1942), upholding gift tax on a transfer in trust with a life estate reserved to the grantor, although the trust property is includible in the donor's gross estate under *Helvering* v. *Bullard,* 303 U.S. 297. The third instance appears in *Commissioner* v. *McLean,* F. (2d) (April 23, 1942), and *Commissioner* v. *Marshall,* 125 F. (2d) 943, wherein the gift tax was held to apply to the value of the intermediate interests created, where there was a possibility of reverter to the grantor, although the entire property is includible in the grantor's gross estate for purposes of the estate tax under *Helvering* v. *Hallock,* 309 U.S. 106. Another instance, not referred to by the Court below, is where there is a transfer by a taxpayer of property to himself and spouse as tenants by the entirety. Under *Lilly* v. *Smith,* 96 F. (2d) 341, the gift tax applies, although this Court has held in *Tyler* v. *United States,* 281 U.S. 497, that the entire property can be included in the taxpayer's gross estate under the estate tax. A final instance may be noted in the case of

the designation of a beneficiary of life insurance without power in the insured to revoke. Under Regulations 79 (1936 ed.) Art. 2 (5), the designation is a taxable gift, yet under *Chase National Bank* v. *United States,* 116 F. (2d) 625, the insurance is included in the insured's estate for purposes of the estate tax where there is a possibility of reverter to his estate.

Where, however, there is an actual transfer at death, correlation between the gift tax and the estate tax exists. Such was the case in *Burnet* v. *Guggenheim,* 288 U.S. 280, wherein the reservation by a grantor of complete power to revoke and amend was held not to result in gift tax. There was a transfer of legal title under property law, but there was not the transfer of substantial economic benefits of ownership, which is controlling in tax cases. See *Helvering* v. *Hallock,* 309 U.S. 106, 111; *Reinecke* v. *Smith,* 281 U.S. 376, 378. In the corresponding situation under the estate tax, in *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339, the estate tax was held to apply. Here there was no extension of the estate tax by description to reach an *inter vivos* transfer. The transfer was a transfer at death, and here we have correlation.

The *Sanford* case, like *Burnet* v. *Guggenheim,* presents a situation in which there was no transfer of the substantial economic incidents of ownership when the trust was created. The grantor retained power to change beneficiaries, substitute new ones and do anything he wished except name himself as beneficiary. Clearly there was no completed gift. In *Porter* v. *Commissioner,* 288 U.S. 436, the trust property was held includible in the grantor's gross estate under the estate tax. As this Court noted in the *Sanford* case, 308 U.S. 39, 43, the taxable transfer in the *Guggenheim* and *Sanford* cases was "the passage of control over the economic benefits of property rather than any technical changes in its title," and such transfer took place at death.

In the instant case, it is clear that "control over the economic benefits" passed when the trust was created. At that time the grantor gave up any right to get back the property, change beneficiaries, or substitute new beneficiaries. When, in 1938, he released his power to distribute among the very limited class of beneficiaries and turned that narrow power over to the trustees there was not the passage of "control over the economic benefits of property" referred to in the *Sanford* case. The transfer of such control had already taken place. The gift tax was not applicable to the relatively insignificant change that took place in 1938 when the trustees, rather than the grantor, became holders of the power to determine distributions among the limited class of beneficiaries.

The Court below in its opinion observed that in *Chickering* v. *Commissioner,* 118 F. (2d) 254, certiorari denied, 314 U.S. 636, it had held that the retention of control over the distributions among a limited class of beneficiaries rendered the property includible in the gross estate of the grantor under the estate tax as the retention of a power to "alter, amend, or revoke." This, however, is one of the transfers during life to which the estate tax reaches out by description. No actual transfer at death takes place. But a transfer at death is not necessary under the estate tax. Under the gift tax, however, a transfer is necessary, and as in all the other situations above discussed where the estate tax reaches out by description to situations involving no transfer at death, there is an absence of correlation of the gift tax and the estate tax.

The crux of this case appears in the following portion of the opinion of the Court below:

> "But where the question arising in gift tax litigation is whether there has been a completed gift inter vivos, we are bound by the Sanford case to correlate the

> gift tax with the estate tax, without regard to what happens under the income tax; and if the gift is incomplete from the viewpoint of the estate tax it must be regarded as incomplete for purposes of the gift tax."

This statement ignores the four examples which the Court itself gave and the two additional examples given in this brief of instances wherein the gift was held incomplete for estate tax purposes, yet complete with respect to gift tax. In all of those cases the question was whether there had been a completed gift *inter vivos*. It is clear from them that where the estate tax reaches out by description to impose a tax without the existence of a transfer at death there can be no correlation of the gift tax and the estate tax. In such cases, and the instant one must be included in the group, the gift tax applies at the time the transfer is made and the overlapping of the gift tax and the estate tax is taken care of by the provision for credit against the estate tax.

While the gift tax is, as this Court pointed out in the *Sanford* case (308 U.S. at p. 44), "supplementary to the estate tax," it is clear from the legislative history of the gift tax that it was intended to supplement both the estate tax and the income tax. See Paul, *Federal Estate and Gift Taxation*, Secs. 17.01, 17.03, 17.20. Such an intention upon the part of Congress appears from the committee reports in connection with the Revenue Act of 1932. H.R. Rep. No. 708, 72d Cong., 1st Sess. (1932); 28 Sen. Rep. No. 665, 72d Cong., 1st Sess. (1932) 40. It also appears from the debate in connection with the gift tax amendment in 1924. 65 Cong. Rec. 3120, 3172 (1924). See also 65 Cong. Rec. 3173, 8095, 8096 (1924). The Court below admitted that the gift tax was "designed to buttress both the estate tax and the income tax."

The Court below in its opinion points out how the gift tax can be integrated with the estate tax and the income tax, but discards the suggestion that the gift tax must perfectly supplement either of them. The Court below attaches little significance to the provision of the estate tax law [5] providing for a credit against estate tax where there is an overlapping of estate and gift taxes. The existence of such a provision would seem an indication that in case of conflict among the three taxes, the gift tax is to be integrated with the income tax and the overlapping of the estate and gift taxes is to be cared for by the credit. The Court below purports to rely on this Court's opinion in the *Sanford* case, which, while recognizing (p. 47) that "one purpose of the gift tax was to prevent or compensate for loss of surtax upon income where large estates are split up for gifts to numerous donees," emphasized the integration of the gift tax with the estate tax as providing "a unified system of taxation of gifts whether made inter vivos or at death." The Court below recognized that the income from the trust property in the *Sanford* case might have been no longer taxable to the donor, but concluded, in footnote (6), that imposition of the gift tax would be ineffective as a discouragement of such transfers or as compensation for the loss of surtax revenue in view of the gift tax credit allowed in computing estate tax. Here the Court completely disregards the legislative purpose of the gift tax. In many cases the imposition of the gift tax would discourage such gifts. At least Congress thought so when it enacted the gift tax. The Court below not only has adopted a defeatist attitude as to the accomplishment of the purpose of the gift tax, but has failed to follow the intent of Congress where such intent clearly appears. But it is for Congress to determine whether or not the statute

[5] The present provision is Section 813 of the Internal Revenue Code.

is successful. The Court is charged only with ascertaining the intent of Congress and with carrying out that intent.

2. The Court below has taken direct issue with one of the reasons upon which this Court based its decision in the *Sanford* case. In that case this Court pointed out (308 U.S. 39, 46) that "It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property so incomplete that he might be deprived of it by the donor the day after he had paid the tax." Yet the Court below has declared that "certainty or uncertainty of benefit from the standpoint of the donees is not the test of the incidence of the gift tax." While it may not be the sole test, certainly it is, as this Court indicated in the *Sanford* case, one of the factors to be considered in deciding whether or not gift tax should be imposed. In the instant case it is an important factor, since it is clear that from the standpoint of the beneficiaries it could make little difference whether the grantor or the trustees made the determination as to what amount each beneficiary was to have.

3. The transfers to the donees in this case were no more complete after March 10, 1938, than they had been prior thereto, since after that date the trustees possessed substantially the same powers that the taxpayer had theretofore held. In holding that a taxable transfer took place in 1938, therefore, the decision of the Court below conflicts with the decision of the Court of Claims in *Cockrell* v. *United States,* 39 F. Supp. 148. See Paul, *Federal Estate and Gift Taxation* (1942) 1168. In the *Cockrell* case trustees were given "such additional powers as the Settlor by any future instrument in writing delivered to the Trustees may grant to them * * *." The Court held that the gifts were incomplete and not subject to gift tax since (p. 153), "So long as this power remained in the hands of the settlor, the remaindermen could never be sure what in-

terest in the trust property, if any, they might eventually receive." In the instant case the trustees, after March 10, 1938, had power to distribute income and principal among the beneficiaries in such proportions as they saw fit. If, therefore, it be held that the gift was incomplete prior to March 10, 1938, it was no more complete after that date, since the powers formerly held by the taxpayer were thereafter in the hands of trustees not having any substantial adverse interest. Cf. *Reinecke* v. *Smith,* 289 U.S. 172; *Commissioner* v. *Prouty,* 115 F. (2d) 331.

4. The Court below refused to give prospective application to Article 3 of Regulations 79, upon which the taxpayer relied, stating that the taxpayer, by asking the Court to hold, "by force of such regulation, that the gift was complete in 1920, when he created the trust reserving in himself no power to regain the beneficial title," was "really contending for a retroactive application of the 1936 regulation." It is submitted that such a statement of the issue with respect to the effect of the gift tax Regulations in this case is clearly in error. The issue is whether, by virtue of what occurred in 1938, gift tax should be imposed for that year, not whether gift tax should have been imposed for 1920, when the trusts were created. This Court, in the *Sanford* case, moreover, did not have before it the question of whether the 1936 Regulations could be given effect prospectively, and merely held that the Regulations would not be given retroactive effect. In *Commissioner* v. *Prouty,* 115 F. (2d) 331, the Circuit Court of Appeals for the First Circuit gave prospective application to Article 3 of the 1936 Regulations 79 in a situation wherein the grantor of a trust reserved power, together with one having a substantial adverse interest, to revoke or amend the trust.

5. The action of the Court below, in giving retroactive application to the 1940 Regulations and in giving no effect

to the 1936 Regulations, ignores completely the fact that the transactions here in question took place at a time when the 1936 Regulations were in force expressly negativing any tax liability, that the 1936 Regulations remained outstanding for more than two years thereafter, and remained unchanged through five successive Revenue Acts. About two years after the transactions in question took place the 1936 Regulations were amended so as to impose a tax liability. The decision below runs counter to the rule set forth by this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116. See *Helvering* v. *Reynolds*, 313 U.S. 428, 432.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 287

ALDUS C. HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 71–81) is reported in 44 B. T. A. 1123. The opinion of the United States Circuit Court of Appeals (R. 89–100) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 2, 1942 (R. 100). The petition for a writ of certiorari was filed on August 7, 1942. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether transfers in trust in 1920 which reserved power in the grantor to alter the distribution of the income and corpus as between designated beneficiaries, but not to revest any of the beneficial interest in himself, are subject to the gift tax in 1938 when the grantor surrendered his reserved power.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts as stipulated (R. 33–65) and as found by the Board of Tax Appeals (R. 71–77) may be summarized as follows:

Aldus C. Higgins, the taxpayer, created two trusts in 1920, one for the benefit of his daughter Elizabeth and her issue (R. 38), the other for the benefit of his son Milton and his issue (R. 50). Since there is no material variation between the two trusts, it is sufficient to state the facts pertinent to the trust for Elizabeth. The taxpayer declared himself the trustee of 662 shares of the capital stock of the Norton Company for the benefit of Elizabeth, her children, and the issue of any such child or children. The trust was to

continue until her death and thereafter until each of her children should have reached the age of 21 years or died. At the termination of the trust the principal was to be distributed pro rata among her then surviving children and the then surviving issue of any deceased child or children by right of representation. There was, however, the possibility of an earlier final distribution of the whole or any part of the trust fund pursuant to certain powers enumerated in the trust instrument. (R. 38–44.)

Taxpayer reserved to himself as settlor "full power and authority to appoint to any beneficiary the whole or any part of the principal of the trust fund." This power could be exercised by will or by deed *inter vivos* and might be so employed as to effectuate immediate "payment and delivery of that portion of the trust fund" so appointed (R. 42). The settlor also reserved to himself power by will or by deed "to modify the terms of this instrument either as to the powers of the trustees with respect to investments or as to their powers with respect to the distribution of income or principal among the beneficiaries herein named or described prior to the termination of the trust" (R. 43). Also, the settlor reserved power to appoint additional trustees, to remove any trustee or trustees, to fill vacancies among the trustees, "or he may refrain from appointing

trustees to such places, and the number of trustees shall be augmented or reduced accordingly" (R. 39).

In his capacity as trustee the taxpayer was given by the trust instrument sweeping powers of management of the trust funds. The trustees were empowered either (a) to accumulate the income, (b) to "apply the same in any way for the support, comfort and education, either in my own household or elsewhere, or otherwise to the benefit of the beneficiaries or any of them," or (c) to "pay over the same either in money or otherwise to the beneficiaries or any of them" (R. 41). The trustees were also given full power and authority to apply to the care, support, education, or otherwise to the benefit of any beneficiary, so much of the principal as they should deem necessary to the health, comfort, education, or otherwise to the best interests of any such beneficiary (R. 41–42).

On March 10, 1938, the taxpayer resigned as trustee and appointed Katharine H. Riley to act as trustee in his stead (R. 34–35, 48–49). On the same day, by virtue of his reserved powers, taxpayer executed a formal instrument amending the provisions of the trust so as to broaden somewhat the discretionary powers of the trustees with reference to the disposition of income and principal; and by the same instrument he released and relinquished "all powers reserved or given to me

by any and all of the provisions of said trust instrument" (R. 35, 48–49).

The Commissioner ruled that the relinquishment of these powers constituted gifts of the whole corpus of each trust fund (R. 7–16). The Board of Tax Appeals sustained the Commissioner and determined a deficiency in gift tax for the year 1938 in the sum of $283,362.65 (R. 85). On appeal by the taxpayer the court below affirmed the decision of the Board (R. 100).

ARGUMENT

1. The case is controlled by the decisions of this Court in *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, and *Rasquin* v. *Humphreys,* 308 U. S. 54, which were followed by the court below (R. 97, 99–100). Those decisions establish that a gift in trust is incomplete if power is reserved in the donor to change the beneficiaries or otherwise alter the disposition of the property, although not to the donor's benefit, and that only upon relinquishment of the power does the transfer become subject to the gift tax. Accordingly, not until 1938 when petitioner resigned as trustee and surrendered his reserved powers did the gifts here involved become taxable.

(a) Petitioner asserts (Pet. 9–10) that the control over the economic benefits of the property here involved passed when the trusts were created, whereas the opposite was true in the *Sanford* case.

But this claim is without substance. The only factual difference relied on to support the claim is that petitioner, unlike the taxpayer in the *Sanford* case, could not substitute new beneficiaries, but could only alter the distribution as between those already designated.

If a transfer is incomplete where the donor reserves the power to alter the benefits receivable by persons other than himself, as was held in the *Sanford* and *Humphreys* cases, there is no sound reason why one should be considered any less incomplete where he reserves the power to change the benefits to be received by members of a limited class of such persons. In neither instance has he made a final transfer to a particular donee or given up the control of the economic benefits in a comparable sense. Thus, the courts have held repeatedly that the corpus of a trust is subject to the estate tax where the grantor has reserved the power to eliminate one or more beneficiaries or to vary the shares distributable to them. *Chickering v. Commissioner,* 118 F. (2d) 254 (C. C. A. 1), certiorari denied, 314 U. S. 636; *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3), certiorari denied, 291 U. S. 660; *Guggenheim* v. *Helvering,* 117 F. (2d) 469 (C. C. A. 2), certiorari denied, 314 U. S. 621; *Holderness* v. *Commissioner,* 86 F. (2d) 137 (C. C. A. 4); *Millard* v. *Maloney,* 121 F. (2d) 257 (C. C. A. 3), certiorari denied, 314 U. S. 636; *Commissioner* v. *Chase Nat.*

Bank, 82 F. (2d) 157 (C. C. A. 2), certiorari denied, 299 U. S. 552.

(b) Petitioner contends (Pet. 5, 13–14) that if the transfers in the present case were incomplete for gift tax purposes prior to 1938, they remained the same thereafter because, concurrently with surrendering his reserved powers, petitioner vested similar powers in the trustees. The court below answered this contention by pointing out that the gift tax is imposed upon the transfer by the donor, rather than upon the receipt by the donees, and that petitioner's action in 1938 made the case the equivalent of one in which a donor transfers property in trust for named beneficiaries without reserving any power in himself but vesting power in the trustees to allocate income or principal among the beneficiaries (R. 98). In such a case it would hardly be claimed that the transfer would not be subject to the gift tax; and any such contention would be rejected.

Cockrell v. *United States,* 39 F. Supp. 148 (C. Cls.), is not in conflict with this conclusion, but is in accord with the decision of the court below. The grantor in that case reserved the power to confer additional powers upon the trustees, including the power to change the beneficiaries or, upon certain contingencies, to revest the corpus in the grantor, and under the *Sanford* decision this reservation of power in the grantor was held sufficient to render the gift incomplete. In the in-

stant case the grantor forfeited all his reserved powers in 1938 and thereby gave up all control of the economic benefits.

2. The court below did not err in refusing to apply Article 3 of Treasury Regulations 79 as promulgated in 1936 (Appendix, *infra,* pp. 13–14). Those regulations, until amended in 1940 to conform with the decisions in the *Sanford* and *Humphreys* cases (Appendix, *infra,* pp. 12–13), provided that a transfer is complete for purposes of the gift tax unless the donor reserves the power to cause the beneficial title to be revested in himself. However, this Court held in the *Humphreys* case that whatever validity the regulations might have as applied prospectively, they were so plainly in conflict with the statute as to preclude them from being applied retroactively to the transfer made by the creation in 1934 of the trust there involved (308 U. S. 54, 56). Similarly, they may not be applied to the transfers effected in 1920 by the creation of the trusts in the present case. It follows under this Court's decisions in both the *Sanford* and *Humphreys* cases that the transfers became taxable in 1938 and that, as was held by the court below (R. 100), this result would be required without regard to the 1940 amendments to the regulations. Accordingly, apart from other distinctions, there is no conflict with *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110, where retroactive effect was denied an amended regula-

tion which changed valid preexisting regulations of long standing.

3. Since the holding of the court below is in harmony with the decisions of this Court in the *Sanford* and *Humphreys* cases and does not conflict with the holding of any lower court rendered subsequent to those decisions, there is no occasion to consider the validity of the views expressed in the opinion of the court below regarding proper correlation of the gift with the estate and income taxes. Neither the different views of petitioner nor the decisions cited in the petition illustrating the absence of correlation between gift and estate taxes in certain other situations furnishes any basis for certiorari.[1] This Court has indicated that the principal problem is to correlate the estate and gift taxes, but has recognized, as did the court below (R. 92–96), that even that desirable end is not possible of perfect accomplishment under the existing statutes. *Estate of Sanford* v. *Commissioner, supra,* pp. 43–46.

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[1] The decisions cited on pages 3–4 of the petition as being in conflict with the decision of the court below present instances in which both a gift tax and an estate tax may be imposed. In none, however, was it held that a transfer was subject to gift tax where the grantor reserved in himself the power to alter the distribution of the property. *Commissioner* v. *Prouty*, 115 F. (2d) 331 (C. C. A. 1); *Helvering* v. *Robinette* (C. C. A. 3), decided March 23, 1942; *Helvering* v. *Marshall*, 125 F. (2d) 943 (C. C. A. 2); *Chase National Bank* v. *United States*, 116 F. (2d) 625 (C. C. A. 2); *Lilly* v. *Smith*, 96 F. (2d) 341 (C. C. A. 7); *Commissioner* v. *McLean*, 127 F. (2d) 942 (C. C. A. 5).

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

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AUGUST 1942.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to

be a transfer by the donor of such income by gift.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 511. GIFTS OF PROPERTY SUBJECT TO POWER.

Subsection (c) of section 501 of the Revenue Act of 1932 (relating to the inapplicability of gift tax in the case of the transfer of property in trust subject to the power of the donor to revest title in himself) is repealed.

Treasury Regulations 79 (1936 Ed.):

ART. 3 [as amended by T. D. 5010, 1940–2 Cum. Bull 293–295]. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the dispo-

sition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and their scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. * * *

* * * * *

The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. * * *

Treasury Regulations 79 (1936 Ed.):

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact

that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. * * *

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